CHARLES W. NELSON
LUCY A. NELSON

IBLA 83-399 Decided August 15, 1983

Appeal from a decision of the Moab, Utah, District Office, Bureau of Land Management, terminating rights-of-way U-34239 and U-34644 for failure to comply with grant stipulation that proof of construction be timely submitted.

Affirmed in part, reversed in part, and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights of Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

   Pending applications for rights-of-way filed under previous and repealed authority shall be considered as applications under the Federal Land Policy and Management Act of 1976. Such rights-of-way are subject to such terms and conditions as the Secretary may prescribe regarding extent, duration, survey, location, construction, maintenance, transfer or assignment, and termination. Termination for noncompliance with a condition of the right-of-way grant is within the discretionary authority of the Secretary.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

   A decision exercising the discretion to terminate a right-of-way grant may be reversed where the record of the decision does not represent a reasoned analysis of pertinent factors with due regard for the public interest.

APPEARANCES: Charles W. Nelson, and Lucy A. Nelson, pro sese.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Charles W. and Lucy A. Nelson appeal from a decision of the Moab, Utah, District Office, Bureau of Land Management (BLM), dated January 21, 1983, terminating rights-of-way U-34239 and U-34644 for failure to submit timely proof of construction, a condition of the grants.

The Nelsons own and manage private lands positioned between the Colorado River and public lands in Grand County, Utah. In 1973, their predecessor filed with the Utah State Engineer applications to appropriate water for irrigation, domestic, and stockwatering uses.

On September 27, 1976, the Nelsons filed with BLM applications for two right-of-way grants for construction and continued maintenance of certain springs and water pipelines therefrom under the authority of the Acts of January 13, 1897, and February 15, 1901. By decision dated February 18, 1977, BLM informed Charles Nelson that the authority under which he applied had been repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), and that his application was accordingly amended to reflect the authority as Title V, FLPMA, 43 U.S.C. § 1761 (1976). Pursuant to FLPMA, several stipulations were added to the grant, and he was given the opportunity to review and appeal them if he so desired. Rights-of-way U-34239 and U-34644, for stock-watering and culinary water pipelines, were granted to appellant effective March 31, 1977, for a period of 30 years. U-34239, 25 feet wide and one-fourth-mile long, parallels an existing road and several utility rights-of-way, and is located in the NW 1/4 SE 1/4 sec. 10, T. 26 S., R. 21 E., Salt Lake meridian, Grand County, Utah. U-34644, also 25 feet wide and one-fourth-mile long, is located within the NE 1/4 NE 1/4 sec. 21, T. 26 S., R. 21 E., Salt Lake meridian. In its land report, BLM concluded that "[t]he rights-of-way would not interfere with any of the present uses nor would it hamper any future uses of this land." One of the conditions imposed upon each grant was that "proof of construction had to be submitted upon completion of construction or not later than 5 years from approval of right-of-way." The grants provide no penalty for failure to comply with this condition.

In 1982, Charles Nelson requested an amendment to the grant allowing him to water his livestock within the rights-of-way. In a decision dated August 26, 1982, BLM rejected that proposal because the rights-of-way are within the Blue Hill grazing allotment. Additional livestock present within the allotment would exceed the livestock grazing capacity and would be inconsistent with 43 CFR 4120.2-1, which provides that the authorized grazing use shall not exceed the livestock grazing capacity. Because pipelines conducting the water from the springs to his property are the only method by which he can use the water, Nelson requested additional time for construction. In a decision dated November 4, 1982, the time to submit the required proof of construction was extended to January 15, 1983.

Meanwhile, the original applications to appropriate water lapsed on May 24, 1982, and on August 16, 1982, Nelson submitted new applications to the Utah State Engineer for appropriation of water for stockwatering purposes only, dropping his application for culinary water. December 4, 1982, was

assigned by the State Engineer as the deadline for protests against the applications. On December 3, 1982, the Utah State Office, BLM, filed a protest with the Utah State Engineer against both applications, claiming: "1. Both water sources are located on public lands and the applicant has no authorization from the BLM to use these lands. [Emphasis added.] 2. While the applicants have a grazing allotment, the water sources are not located within that allotment." A request for a hearing regarding the protest was granted by the State Engineer. 1/

In a letter filed with BLM on January 10, 1983, the Nelsons requested an additional extension of time as the issue regarding water rights had not been resolved. In its decision dated January 21, 1983, the Moab District Office, BLM, canceled the rights-of-way because proof of construction was not received within the allotted time. No reference was made in that decision to BLM's protest against the applications filed with the State Engineer, nor did that decision allude to the Nelsons' second request for an extension, which was then pending and which had been filed only 11 days earlier.

Initially, we notice that appellants' applications which the State Office protests are for two water sources in section 10 and do not encompass any water sources in right-of-way U-34644 located in section 21. The first source, application A-58090, is known as "Old Stone Springs Area" and the applied-for appropriation point is "AT A POINT N. 2689 FT., E. 1157 FT. FROM S 1/4 COR., SEC. 10." By our somewhat crude method of reference to the map prepared for appellants' right-of-way applications and the included map scale, one arm of right-of-way U-34239 extends to a point approximately north 2,700 feet and east 1,100 feet of the south quarter-corner of section 10. That corresponds roughly with the point of appropriation aforementioned. However, the second source, application A-58091, an unnamed spring, is to be appropriated "AT A POINT N. 1950 FT., E. 2050 FT. FROM S 1/4 COR., SEC. 10," Through our calculations, the second arm of right-of-way U-34239 appears to extend to a point approximately north 1,850 feet and east 975 feet from the south quarter-corner of section 10. These two points are dissimilarly positioned and, thus, the point of appropriation as described in application A-58091 is not within right-of-way U-34239.

In response to our Order dated June 2, 1983, requesting clarification of these ambiguities, appellants concede a lack of basis to appeal termination of right-of-way grant U-34644 and withdraw that portion of their appeal. Regarding the discrepancy between water right application A-58091 and right-of-way U-34239, appellants state, "On our August 16, 1982, water application, we tried to show the outlet or mouth of where the springs come out of the ground and the source of water. The right-of-way grants as shown should be alright for completion as have been granted in U-34239." This apparently is a reference to a plan to divert the appropriated water at a point other than the source.

1/ A hearing was conducted June 2, 1983, by representatives of the Utah State Engineer. According to the record, the matter was taken under advisement and we are not aware of a determination regarding the water rights applications.

[1] The original pending applications for the right-of-way grants were properly amended to reflect the authority as Title V, FLPMA, 43 U.S.C. §§ 1761-1770 (1976). 43 U.S.C. § 1770(a) (1976); Nelbro Packing Co., 63 IBLA 176, 184 (1982).

FLPMA provides that rights-of-way may be granted subject to such terms and conditions as the Secretary may prescribe regarding extent, duration, survey, location, construction, maintenance, transfer or assignment, and termination. 43 U.S.C. § 1764(c) (1976). See also 43 U.S.C. § 1765 (1976). Appellants decidedly failed to comply with the grant provision that they supply proof of construction within 5 years. However, 43 U.S.C. § 1766 (1976) reads in part, "Abandonment of a right-of-way or noncompliance with any * * * condition of the right-of-way * * * may be grounds for suspension or termination." (Emphasis added.) See also 43 CFR 2803.4(b). Thus, noncompliance with a condition of the right-of-way does not invoke automatic termination, but the decision to terminate for noncompliance is within the discretionary authority of the Secretary.

[2] Although the exercise of discretion regarding a decision to terminate a right-of-way under FLPMA has not been specifically addressed, the standard for review of a decision rejecting an application for a right-of-way under FLPMA is whether the record of the decision represents a reasoned analysis of pertinent factors with due regard for the public interest. Anita Robinson, 71 IBLA 380 (1983); William A. Sigman, 66 IBLA 53 (1982); Peregrine Broadcasting Co., 62 IBLA 133 (1982). Termination of the rights-of-way prior to construction of the proposed pipelines adversely affects the grantee in the same manner as if his application had been rejected. Thus, BLM is obligated to give the same attention to the attendant factors and public interest. We believe, upon careful review of the record, that the Moab District Office's decision to terminate right-of-way U-34239 does not meet this standard.

The District Office's decision to terminate the grants was based upon appellants' failure to submit proof of construction for the pipelines. Appellants waited construction of the pipelines within right-of-way U-34239 because their rights to the subject waters had not been ascertained by the State Engineer. Without water rights, appellants had no purpose for the pipelines. The State Engineer's action on appellants' applications was suspended due to BLM's protest, which apparently engendered the need for a hearing. The record does not reflect that the District Office gave consideration in its decision to that circumstance.

In its protest, the State Office stated that appellant had no authorization from BLM to use these lands, which was clearly wrong. That statement does not recognize the 30-year grants of right-of-way issued by BLM to appellant, which he had held for 5 years and for which the time for filing proof of construction had been extended by the District Office less than a month earlier. BLM's second statement, that the water sources are within a grazing allotment not belonging to appellant likewise fails to recognize that BLM had twice authorized the construction of pipelines so that he might conduct that same water to his own land. The quantity of water available for appropriation is to be determined on a case-by-case basis. See Purposes of

Executive Order of April 17, 1926, Establishing Water Reserve No. 107., 90 I.D. 81 (M-36914 Supp. II, Feb. 16, 1983). 2/

The Board is at a loss to understand the basis for BLM's actions in this case. It granted the Nelsons' rights-of-way, then extended the grants, and then, less than a month later, interceded in their proceeding before the State Engineer in an effort to prevent their acquisition of the water rights which were the very object of granting those rights-of-way. This may be a matter of BLM's left hand not knowing what its right hand was doing.

Moreover, BLM's protest to the State Engineer against appellants' application to appropriate water appears to be entirely unjustified. If BLM has a legitimate reason for filing its protest, it certainly is not reflected in the record. Moreover, that protest misrepresented to the State Engineer that "[t]he applicant has no authorization from BLM to use these lands," thereby severely prejudicing the prospect of success of the Nelsons' applications.

Upon remand, BLM will either formally withdraw its protest to the State Engineer or, if it has legitimate reasons for maintaining the protest, it will formally amend the protest so as to reflect those reasons and to expressly acknowledge and retract the misstatement in the original protest. Moreover, right-of-way U-34239 shall be extended until the Nelsons' application to appropriate these waters is acted upon with finality by the State

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2/ Appellant seeks to appropriate water from springs which originate on Federal lands that flow into the Colorado River. The Executive Order of Apr. 17, 1926, withdrew "every smallest legal subdivision of the public land surveys which is vacant, unappropriated unreserved public land and contains a spring or waterhole." However, the purposes for which public springs and water holes were withdrawn were relatively narrow and specific. Federal Water Rights, 86 I.D. 553, 581 (M-36914, June 25, 1979).

The Solicitor concluded in a supplement to the June 25, 1979, opinion that:

"The springs and water holes reserved pursuant to the Executive Order of April 17, 1926, were reserved to prevent `private monopolization,' 86 I.D. at 581 of the public domain through control of tracts of public domain land larger than the 640 acres allowed to be homesteaded by an individual. The purposes for which water was thus reserved in these water sources are limited to human and animal consumption. The right to use water from these water sources for any other purpose must be obtained pursuant to state law because those other purposes do not come within the reserved water right. (See Federal Non-Reserved Water Rights, 88 I.D. 1055 (M-36914 Supp. I, Sept. 11, 1981.) The entire flow or quantity of water from these reserved sources was accordingly not reserved unless necessary for the primary purposes--a fact which must be determined on a case-by-case basis."
90 I.D. 81, 83 (M-36914 Supp. II, Feb. 16, 1983) (emphasis in original).

However, a spring or waterhole is not "important," that is, it is de minimus in quantity, when it is insufficient to provide the water supply for tracts of land larger than 640 acres. Such water source is unreserved and subject to state subtantive or procedural laws in appropriating water. See Nonreserved Water Rights, 88 I.D. 1055 (M-36914 Supp. I., Sept. 11, 1981).

authorities, and for 1 year thereafter for completion of construction if they are granted the right to appropriate water from the subject springs.

Should BLM elect to maintain its protest by amendment, as provided above, appellants may regard that as an action adversely affecting them, from which an appeal to this Board will lie.

Appellants are admonished that even should they succeed in acquiring the right to appropriate water from these springs for stockwatering purposes, their cattle may not go on the lands affected by the right-of-way, and that any willful livestock trespass upon those lands may be cause for cancellation of the right-of-way in addition to liability for damages.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision regarding right-of-way U-34644 is affirmed, but insofar as that decision cancels right-of-way U-34329, it is reversed and remanded for further action consistent herewith.

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Edward W. Stuebing
Administrative Judge

We concur:

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R. W. Mullen
Administrative Judge

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Douglas E. Henriques
Administrative Judge